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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner, etc. *et al.*,

Petitioners,

—v.—

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The petition for a writ of certiorari seeks review of a judgment entered in this case on January 25, 1972 by the Court of Appeals for the Second Circuit, sitting en banc, reported at 456 F.2d 79, which affirmed three decisions of the United States District Court for the Northern District of New York granting relief under 42 U.S.C. §1983. Both the District Court and the Court of Appeals, sitting en banc, held that the plaintiff-prisoners had been unconstitutionally deprived of good behavior time credits, and that the District Court had jurisdiction to order restoration of the time credits in question.

Statement

Each of the three respondents herein was a prisoner in a New York correctional facility at the time he commenced his action. Each challenged the unconstitutional depriva-

tion of good behavior time credits by prison officials. Hearings were held in the United States District Court, which sustained the claims, and ordered the restoration of the time credits in question. The result of such restorations was that each respondent immediately became eligible for conditional release under applicable state law.

Petitioners appealed in each case, arguing that state prisoners were required to exhaust state judicial remedies before they could be heard in federal court on their claims that prison officials violated their constitutional rights. Following arguments before the Court of Appeals sitting en banc, the Second Circuit, by a 9-3 vote, affirmed the judgments of the District Court, on the authority of this Court's recent decision in *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S. Ct. 407 (1971).

REASONS FOR DENYING THE WRIT

Petitioners are asking this Court to repudiate fundamental and sound principles of federal jurisdiction which it has just reaffirmed in the case of state prisoners who complain that prison officials violated their constitutional rights.

In *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S. Ct. 407 (1971), this Court declared:

> "Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and

refused before the federal one is invoked.' Monroe v. Pape, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473 (1961); McNeese v. Board of Education, 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 U.S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). *State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.* Houghton v. Shafer, 392 U.S. 639, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' Id., at 640." 92 S. Ct. at 409 (emphasis added).

Despite this quite clear language, petitioners are explicitly asking this Court to hold that state prisoners do have lesser rights to a federal forum than other litigants under 42 U.S.C. §1983 and, unlike other litigants, must exhaust state judicial remedies before availing themselves of a federal forum.

Not only is petitioners' contention directly contrary to what this Court said in *Wilwording,* but there is no authority or support for it anywhere. This is because *Wilwording* simply reaffirmed what this Court had said in *Houghton* v. *Shafer,* 392 U.S. 639 (1968), and as early as *Monroe* v. *Pape,* 365 U.S. 167 (1961). Those lower courts that have passed directly on the question have taken the same position. See, e.g., *Edwards* v. *Schmidt,* 321 F. Supp. 68, 77 (W.D. Wis. 1971); *Landman* v. *Royster,* 333 F. Supp. 621, 650-1 (E.D. Va. 1971). *Wilwording* itself was so clear on this point that even those Court of Appeals judges who

were sympathetic to petitioners' position felt the issue was closed and that they had no choice but to affirm.

Nor can petitioners even claim that there is a conflict of circuits on this issue. No other circuit decision is cited in support of the petition and as noted, the few courts that have dealt with the issue have agreed with the court below. See *Landman* v. *Royster, supra; Edwards* v. *Schmidt, supra.* The Second Circuit itself has not heretofore adopted such a rule. Indeed, if petitioners' contention is correct, this Court as well as others, has wrongly taken jurisdiction of a whole host of cases brought by prisoners under 42 U.S.C. §1983, where state remedies were not exhausted. See, *Haines* v. *Kerner,* 404 U.S. ——, 92 Sup. Ct. 594 (U.S. Jan. 13, 1972); *Cruz* v. *Beto,* 404 U.S. ——, 92 Sup. Ct. 1079 (U.S. March 20, 1972); *Cooper* v. *Pate,* 378 U.S. 546 (1964); *Lee* v. *Washington,* 390 U.S. 333 (1968); *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969).*

On the merits, petitioners' contentions are equally baseless. In the first place, the fact that there is a complaint about the *conditions* of custody (Petition, pp. 18-19) implies nothing about whether that person is illegally "in custody" for purposes of 28 U.S.C. §2254. Indeed, the plain meaning of the phrase would imply that it is limited to attacks on the *fact* of custody, not its *characteristics.*

Secondly, the expanding interpretation of *habeas corpus* (Petition, p. 19) is, of course, irrelevant. In *Wilwording*

* In a footnote, petitioners claim that "the evident confusion of the Court below is typical of the other cases decided within the Second Circuit. See *Oswald, et al.* v. *Gesicki, et al.,* . . . " Petition, p. 18. But as this Court's summary affirmance of the decision in that case indicates, 405 U.S. ——, 40 U.S.L.W. 3537 (May 15, 1972), there is no confusion on this issue anywhere but in the petition.

itself, the Court first noted that *habeas corpus* was appropriate, and then added that the Civil Rights Act was *also* available, thereby explicitly indicating that in prisoners' rights cases, the availability of *habeas* does not, contrary to petitioners' contentions, preclude a Civil Rights Act proceeding without exhaustion.

Thirdly, there is no point to distinguishing between "good time" cases and others (Petition, p. 20), for the same issues of constitutional deprivation will be raised in both types of cases. For example, a suit challenging unlawful denial of good time can also seek damages, or declaratory relief. See, e.g., *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied sub nom., *Sostre* v. *Oswald*, 404 U.S. —, 92 S. Ct. 719 (1972). To require exhaustion for the "good time" issue but not for the damages claim seems illogical. Petitioner apparently recognizes this, since it does not really press this distinction, though mentioning it briefly. See Petition, p. 20.

Petitioners' views on the superiority of *habeas corpus* to 42 U.S.C. §1983 for the *prisoner* (Petition, pp. 21-24), seems refuted by the respondents' and other prisoners' frequent recourse to the latter. As for the impact on federal-state relations (Petition, pp. 24-28), the short answer is that the Federal Civil Rights Act is designed to ensure that the Constitution will be observed by state officials. The tragic history of the American prison system and the few judicial responses for change, e.g., *Haines* v. *Kerner*, *supra*; *Cruz* v. *Beto*, *supra*; *Lee* v. *Washington*, *supra*; *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Wright* v. *McMann*, 387 F.2d 519 (2nd Cir. 1967) *on remand* 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part, rev'd in part, mod. in part* — F.2d —— (2d Cir. 3/16/72)—reflect the great need for a federal presence.

Moreover, in New York at least, there is *no* adequate state damages remedy, for under New York Civ. Rts. L. §§79 and 79-c, state prisoners may not sue for they are civilly dead. See *Green* v. *State*, 278 N.Y. 15, 14 N. E. 2d 883 (1938); *Hewson* v. *State*, 27 A.D.2d 358, 279 N.Y.S.2d 790 (1967). An exhaustion requirement will thus deprive prisoners of a federal forum and offer them little or nothing in return.

In sum, petitioner is asking this Court to repudiate an unbroken and recently reaffirmed line of decisions, and especially this Court's recent statement that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording* v. *Swenson*, *supra*. This repudiation is urged in the absence of any inter-circuit conflict and for no sound policy considerations.

CONCLUSION

For the foregoing reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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